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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Date of Filing: **September 23, 2004**

Case No.: **TIA-0215**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant was a DOE contractor employee at a DOE facility from 1970 to 1997. An independent physician panel (the Panel) issued a determination (the 2003 determination) that the Applicant's illnesses were not related to his work at DOE, and the OWA accepted that determination. The Applicant appealed to the Office of Hearings and Appeals (OHA), which granted the appeal and remanded the application for further consideration. *See Worker Advocacy,* Case No. TIA-0032, 28 DOE ¶ 80,322 (2004) (the Remand Order). The Panel issued a second negative determination (the 2004 determination), which the OWA accepted. The Applicant appealed the 2004 determination. As explained below, we have determined that the appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program

for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8. The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a) (2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed at a DOE facility as a janitor and structural group tradesman from 1970 to 1997. In 1997, the Applicant retired on disability. In his application, he identified a number of claimed illnesses – toxic encephalopathy, chronic sinisitis, induced food intolerance, gastrointestinal symptoms, difficulty concentrating, fibromyalgia, chronic fatigue syndrome, pulmonary fibrosis, obstructive sleep apnea, and depression. He attributed the illnesses to working around toxic dusts and

chemicals at DOE, and he specifically mentioned a 1985 incident involving exposure to fumes. The OWA referred to application to the Panel.

The Panel issued the 2003 determination. Two physicians found insufficient evidence of illnesses related to DOE employment. The third physician found sufficient evidence that the Applicant's lung illness and psychological impairment were related to DOE employment. The OWA accepted the majority Panel determination, and the Applicant appealed.

In response to appeal of the 2003 determination, we issued the Remand Order. In the Remand Order, we found that the Panel had not complied with the Rule in two ways. First, we found that the Panel applied a more stringent standard than the Rule permits. We cited the following language in the 2003 determination:

> Two panelists thought there was insufficient documentation to support any work relatedness to the claims. [The worker] was very thoroughly evaluated by multiple specialists from the mid 1980's to the mid 1990's none of whom could arrive at any definitive association between work conditions and his symptoms, nor could they substantiate his claimed illnesses.

Remand Order, slip op. at 3, 28 DOE at 80,961-62, *citing* 2003 Determintion. We stated that the wording was problematic in two ways.

> First, the panel's reference to the worker's evaluation by medical specialists suggests that the panel did not make its own independent determination, but rather relied on the medical specialists. Second, the panel's reference to the lack of a "definitive" association between the worker's symptoms and his work reflects a higher standard than the "at least as likely as not" standard.

Id. Second, we found that the Panel had not adequately explained the basis of its determination. We noted the Panel's statement that "none" of the specialists could substantiate an illness or its work-relatedness. We stated that some of the specialists did diagnose pulmonary disease, brain dysfunction, and multiple chemical sensitivities. Based on the foregoing, we remanded the application for further consideration.

In response to the Remand Order, the Panel issued the 2004 determination. In the 2004 determination, the Panel addressed four

illnesses - toxic encephalopathy, fibromyalgia, sleep apnea, and diabetes. The Panel found insufficient information to conclude that the Applicant had toxic encephalopathy, fibromyalgia, or diabetes. The Panel found evidence of a medical diagnosis of sleep apnea but found insufficient evidence to conclude that it was related to exposure to a toxic substance. The OWA accepted the 2004 determination, and the Applicant filed the instant appeal.

In his appeal, the Applicant argues that he has submitted sufficient information to establish that "it is at least as likely as not" that he has the claimed illnesses and that they are related to his employment at DOE. In the alternative, he states that he is currently seeing specialists for his illnesses and has additional records.

II. Analysis

The 2004 determination was not responsive to the Remand Order. The Remand Order's finding that the 2003 determination applied an overly stringent standard was not limited to a subset of illnesses. Accordingly, the Remand Order required that the Panel reconsider its determination on all the claimed illnesses. The 2004 determination did not do that. Instead, the 2004 determination considered three of the claimed illnesses - toxic encephalopathy, fibromyalgia, sleep apnea – and a fourth illness – diabetes - that the Applicant never claimed. Because the Applicant did not receive the comprehensive second review contemplated by the Remand Order, such a comprehensive review is in order.

Further consideration of the application should provide an opportunity to the Applicant to submit additional medical records. The general thrust of the 2004 determination is that the records submitted by the Applicant do not represent clinical characterization of, or treatment for, the claimed conditions. In his appeal, the Applicant indicates that he has such records. Accordingly, the Applicant should consult with the DOL on the procedure for submitting this evidence.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0215 be, and hereby is, granted as set forth in Paragraph (2) below.

(2) The application warrants further consideration based on the applicable standard and additional evidence to be provided by the Applicant.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 18, 2005